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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 893

I. L. CLAYTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR AFFIRM

The United States moves to dismiss or affirm on the ground that the jurisdictional statement discloses that this Court is without jurisdiction to entertain this appeal and that, in any event, the case raises no substantial question.

STATEMENT

This is a direct appeal from summary judgment granted by a three-judge district court (J.S. 18-26) holding that the North Carolina Sales and Use Tax Act unconstitutionally discriminates against the United States and in favor of that State's counties and incorporated cities and towns.

210-373—66

The relevant North Carolina statutes (reprinted J.S. 3–5) impose a three percent tax on the purchaser of all tangible personal property which becomes a part of any building or other structure in the State, measured by the purchase price of the article in question. North Carolina General Statutes, Vol. 2D, § 105–164.6(3). The statutes provide for a refund to be made on the application of any North Carolina county or incorporated city or town which bears the economic burden of the tax either directly (because it is the user or purchaser of the taxable item) or indirectly (because the tax is paid and passed on by a contractor using the item in a structure owned by the political subdivision). *Id.*, § 105–164.14(c). The statute does not, however, provide for any refund to the United States or its agencies on account of taxes collected from contractors constructing or repairing federal facilities. Although the statute does contain an exemption for "Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State" (*id.*, 105–164.13(17)), the North Carolina taxing authorities rejected the federal government's claim for a refund of taxes which had been paid by contractors who had passed the taxes on to the federal government. The instant suit was then instituted on the ground that the Act, as applied, discriminated against the federal government in denying it a refund for taxes which it paid indirectly while granting such a refund to the State's political subdivisions, and thus that the Act violated both the State and federal Constitutions.

The district court sustained the government's position on the federal constitutional question (without reaching the State constitutional issue) and granted summary judgment (J.S. 19). However, the court held that enjoining the tax would put the federal government in a more favorable position than the State's subdivisions, which were required to reimburse the private contractors and sue for a refund. Thus, the district court sought to place the government on an equal footing by (1) nullifying the "provisions of the Act and the regulations which operate to deny the United States a tax refund when an appropriate and timely request therefor is made" and (2) providing for a hearing to determine the amount of refund to which the United States is entitled with respect to taxes already collected (J.S. 25).

Appellant seeks reversal on the grounds that (1) the Act is not unconstitutionally discriminatory, and (2) if the Act is unconstitutionally discriminatory, the appropriate remedy is to strike down the provision allowing a refund to the State's subdivisions rather than to imply a similar refund provision in favor of the United States.

ARGUMENT

1. This Court is without jurisdiction to entertain the instant appeal. While 28 U.S.C. 2281 required all aspects of the case to be tried by a three-judge district court because the United States sought, *inter alia,* an injunction restraining the operation of a State statute as unconstitutional (*Sterling* v. *Constantin,* 287 U.S. 378, 393–394; *Florida Lime Growers*

v. *Jacobsen*, 362 U.S. 73, 80–81), only the decision of the three-judge court denying the injunction is, under 28 U.S.C. 1253, directly appealable to this Court (*American Insurance Co.* v. *Lucas*, 314 U.S. 575). Appellant was the successful party with respect to the requested injunctive relief;[1] he is not appealing from the order denying the injunction; and, consequently, he has no standing to appeal directly to this Court. *Pub. Serv. Comm'n* v. *Brashear Lines*, 306 U.S. 204; *Lindheimer* v. *Illinois Tel. Co.*, 292 U.S. 151, 176; *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645.[2]

2. The constitutional question which appellant seeks to raise has been decided adversely to his contention by this Court, other federal courts, and the highest courts of several States. There is no conflict and the present appeal raises no question of substance.

In *Moses Lake Homes* v. *Grant County*, 365 U.S. 744, 751, this Court quoted with approval the following language used in *United States* v. *City of Detroit*, 355 U.S. 466, 473:

> It still remains true, as it has from the beginning, that a tax may be invalid even though

[1] While at the outset of its opinion the district court stated that the government was entitled to summary judgment and injunctive relief (J.S. 19), it later held that no injunction would be granted (J.S. 24–25).

[2] The government has filed a cross notice of appeal from the denial of its application for an injunction. However, the government's appeal is protective only, in that its purpose is to preserve its rights with respect to its request for injunctive relief in the event the Court should find that it has jurisdiction of the instant appeal and further determine that the relief under the judgment below is inappropriate.

> it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals.

Here the State statute, unless construed to authorize refunds to the United States, would impermissibly discriminate against the federal government, for the United States would be subjected to the ultimate economic burden of sales and use taxes imposed upon its contractors, while North Carolina counties and incorporated cities and towns could obtain a refund of taxes passed on to them by their contractors. The inequality in treatment would be no different than that condemned in *Moses Lake Homes* v. *Grant County, supra; Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376; *United States* v. *Department of Revenue of State of Ill.*, 191 F. Supp. 723 (N.D. Ill.), vacated and remanded, 368 U.S. 30, on remand, 202 F. Supp. 757, affirmed *per curiam*, 371 U.S. 21; *Knapp-Stiles* v. *Dept. of Revenue*, 370 Mich. 629, 122 N.W. 2d 642; *Comptroller* v. *Pitts.-Des Moines*, 231 Md. 132, 189 A. 2d 107, certiorari denied, 375 U.S. 821; and *Mason & Hanger—Silas Mason Co.* v. *Iowa State Tax Commission*, 139 N.W. 2d 437 (Sup. Ct. Iowa).

In *Phillips* and *Moses Lake Homes*, this Court held that lessees of federally-owned lands were entitled to tax treatment as favorable as that accorded lessees of State or privately-owned land. In the *Phillips* case the Court said that "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself. * * * [I]t still remains true, as it has from the time of *M'Culloch* v. *Maryland*, 4 Wheat.

316, that a state may not discriminate against the Government or those with whom it deals" (pp. 385, 387). The *Department of Revenue of State of Ill.* and *Pitts-Des Moines* cases held that vendors to or contractors with the federal government are entitled to exemptions from sales taxes so long as vendors to or contractors with the State or its political subdivisions are exempt from such taxes. The North Carolina statute here is distinguishable from the State statutes in the last two cited cases only in that the North Carolina Act provides for refunds rather than exemptions to the State's political subdivisions. The distinction is without a difference since in either case the State's political subdivisions can escape a tax which is levied on the federal government. The *Mason & Hanger* case explicitly so held in a case where, as here, the State allowed refunds to its political subdivisions.

In these circumstances "[t]he imposition of a heavier tax burden on [the federal government] * * * than is imposed on [the State's subdivisions] * * * must be justified by significant differences between the two classes." *Phillips Co.* v. *Dumas School District, supra,* at 383. Here North Carolina has shown no reasonable basis for placing a heavier tax burden on the United States than on its own subdivisions. In *United States* v. *Department of Revenue of State of Ill.,* the three-judge court said (191 F. Supp. at 729):

> It is difficult for us to perceive a reasonable distinction which grants one freedom from contributing to the cost of government and imposes the burden upon the other. Further, the

> imposition of the tax upon one and not the other permits the State to deal with retailers at a lower cost and imposes an increased cost upon the Federal Government dealing with the same class of persons. Assuming that the statutory exemption may have the laudable public purpose of reducing governmental costs, it is equally applicable to the Federal Government thus benefiting all citizens of the United States, including the citizens of the State of Illinois.

See also *Comptroller* v. *Pitts.-Des Moines,* 231 Md. at 141–143, 189 A. 2d at 112–113; *Mason & Hanger-Silas Mason Co.* v. *Iowa State Tax Commission,* 139 NW 2d at 441.[3]

Appellant argues that allowing sales tax refunds to counties and incorporated cities and towns is really no different than the State giving grants-in-aid to its political subdivisions. We disagree. The refunds are made only to those counties, towns and cities which have borne the economic burden of a sales or use tax and the amount of the refund is precisely the same as the amount of tax paid. Thus, the refund

[3] It is not material that the court below stated its ruling was grounded on the Fourteenth Amendment (J.S. 18–19), since the classification principle was applied in accord with this Court's holding in *Phillips.* The government actually had not invoked the Fourteenth Amendment. While its complaint asserts unreasonable classification as one of the grounds for relief, the federal government's immunity from State taxation stems from a much older concept than the Fourteenth Amendment, namely, the Supremacy Clause (Art. VI), established as far back as *M'Culloch* v. *Maryland,* 4 Wheat. 316. See *United States* v. *Allegheny County,* 322 U.S. 174, 191, and *Phillips Co.* v. *Dumas School Dist., supra.*

is merely an abatement of taxes, and is far different from a discretionary grant-in-aid made from a State's general treasury without regard to the tax burdens borne by the recipient. As the court below pointed out (J.S. 21), North Carolina may not choose to assist its subordinate governmental units in such a way that it discriminates against or sacrifices the interests of the federal government. See, *e.g.*, *Comptroller* v. *Pitts.-Des Moines,* 231 Md at 143, 189 A. 2d at 113.

Finally, appellant argues that if the North Carolina taxing scheme is unconstitutional, the proper remedy is to hold void the provision for refunds to the State political subdivisions rather than to give the United States a right to a refund. While the North Carolina legislature is free to adopt this result for the future, the lower court was correct in rejecting it. First, the Act as a whole demonstrates that the State legislature intended to free its political subdivisions from the burdens of the sales tax in all events and to exempt the federal government if, as here, it is constitutionally required to do so. (See North Carolina General Statutes, Vol. 2D, § 105–164.13(17) exempting "Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States.") Moreover, since the State subdivisions had already obtained refunds of taxes paid in the past, the only way in which the court could have prevented discrimination against the United States was to allow it a refund of taxes already paid. Finally, this Court and State supreme courts have held that where a State tax discriminates against

the federal government, the proper remedy is to eliminate the tax on the federal government rather than to force the State, contrary to its laws, to impose the tax on its own subdivisions. See cases cited *supra*, p. 5. The remedy afforded by the court below is, indeed, less drastic than in those cases. Instead of enjoining the tax as applied to contractors for the United States, the court has merely granted the government the same right to apply for a refund as the State's subdivisions have.[4]

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the district court should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
RICHARD M. ROBERTS,
Acting Assistant Attorney General.
I. HENRY KUTZ,
ROBERT A. BERNSTEIN,
Attorneys.

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[4] The United States has taken a protective cross-appeal on this point. See *supra*, p. 4, fn. 2.

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